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Kembang Serantau Sdn Bhd v Perbadanan Putrajaya

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-640-09
OF 2019
MOHD ARIEF JC
23 FEBRUARY 2022

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Contract — Consent order — Claim for sum due and payable under consent order — Claim for work done — Plaintiff claimed against defendant for sum due and payable under consent order — Defendant argued that certain amount ought to be deducted from sum due and payable based on variation order — Whether defendant entitled to issue variation order after issuance of certificate of practical completion and certificate of making good defects — Whether deduction made in variation order was justified — Whether terms of consent order constituted unequivocal admission of sum due and payable

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Evidence — Burden of proof — Shifting of — Whether argument of defendant was proven — Whether burden of proof shifted to plaintiff to rebut defendant's argument — Whether plaintiff had proven its case against defendant — Evidence Act 1950 ss 101 & 102

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Evidence — Witness — Demeanour of witness — Whether defendant's witnesses credible

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The plaintiff and the defendant had entered a contract ('the contract') in relation to a project entitled 'The proposed Planting and Maintaining of Forest Species Works inclusive of infrastructural and landscaping works for Taman Rimba Alam at Precincts 14 & 15 Putrajaya for Perbadanan Putrajaya' ('the project') which was awarded by the plaintiff to the defendant. Dispute arose when the defendant failed to pay the balance payment in relation to the project.

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Consequently, the plaintiff filed the present application ('the plaintiff's claim') seeking; inter alia: (a) a declaratory order that the sum of RM3,136,293.25 ('the total sums outstanding') was the sum due and payable under the consent order dated 9 November 2011 ('the consent order'); (b) a declaratory order that the draft final account prepared by the defendant was not valid, was disputed, and was unenforceable; and (c) a declaratory order that the sum of RM58,417.57 contained in the draft final account that was not agreed upon was a sum that was not valid, disputed, and was not enforceable. The defendant argued that the sum of RM3,077,878.68 should be deducted from the total sums outstanding pursuant to variation order No 15 ('the variation order')

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which was issued by the defendant after the issuance of the certificate of practical completion ('COPC') and certificate of making good defects ('CMGD') by the defendant's representative. The variation order was issued allegedly for dead trees, costs of replacement, and maintenance of the trees replaced. In response to the defendant's argument, the plaintiff contended that as the defendant did issue the CMGD, all works had been completed by it, as such, the variation order was wrongly issued seven months after the CMGD was issued. The main issues to be determined was whether the defendant was entitled to issue the variation order and whether the deduction made in the said variation order was justified in the circumstances of this case. The plaintiff had also raised several other issues in relation to: (i) the difference in the figures in the statement of final account regarding the plaintiff's draft final account and the defendant's draft final account; (ii) the effect of the consent order; and (iii) the demeanour of the witnesses.

Held, dismissing the plaintiff's claim with costs of RM30,000 subject to allocator:

- (1) It was irrefutable that after the issuance of the COPC, the plaintiff admitted in its letter dated 31 March 2010 that there were about 15,958 trees that were either dead or were rejected by the defendant. The plaintiff admitted that these trees were not accepted by the defendant, and it gave details of the work programme that the plaintiff would undertake to rectify the said defects in accordance with the terms of the contract. Further, in the tender document, the plaintiff stated that 'We are responsible for replacing any plants which fail to survive as a result of inadequate operations, poor workmanship or poor quality of plant material prior to completion or any other reason during the operation of the contract'. Therefore, the defendant was correct that the plaintiff was required to replace the dead trees or any rejected trees under the terms of the contract during the defect liability period (see paras 37–39).
- (2) What was important was whether the CMGD certificate was final and represented that the work was completed, and that the defendant should pay the plaintiff for the sums claimed. The court was of the view that the CMGD was not final and binding but was merely prima facie evidence of the work done ('the prima facie evidence'). This prima facie position may be rebutted by the defendant up to the point when the final certificate was issued. The defendant was not entitled to issue any variation orders after the CMGD was issued unless agreed to by the plaintiff. The final certificate was issued based on the actual work done by the plaintiff to the satisfaction of the defendant. Further, cl 46.1 and 49.1 did indicate that the certificates issued by the representatives were not final and conclusive (see paras 52 & 56).

- A (3) The defendant did issue a variation order after the CMGD was issued by it and generally, as stated above, a contractor was not bound by a variation order issued after the date of the CMGD. However, the court found that the facts of this case showed that the true nature of the said document was not that of a variation order but was a certificate to confirm the amount of actual work undertaken by the plaintiff. This was also confirmed in the list of trees planted produced by the defendant. The said list and the variation order were consistent with one another and indicated that only 82,573 trees were planted and the remaining 13,390 trees were not replanted (see paras 74–75).
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- D (4) The defendant must produce evidence to rebut the prima facie evidence. In the present case, the court found that the defendant had produced voluminous documents to show the number of trees that were planted by the plaintiff and accepted and rejected by the defendant. Therefore, pursuant to ss 101–102 of the Evidence Act 1950, the burden of proof shifted to the plaintiff to show that it had undertaken the work. However, there was no evidence by the plaintiff to show that it had planted or replaced the dead trees or rejected trees, as such, the plaintiff had failed to prove its contention. The plaintiff was therefore not entitled to claim for the full contractual sums as these trees were not planted and not maintained by the plaintiff appropriately in accordance with the terms of the contract. The court held that the plaintiff was only entitled to be paid the sum of RM58,417.57 (see paras 60–61, 64–65, 67 & 76–77).
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- F (5) In respect of the difference in the figures in the statements of final account, the court agreed that there was a difference between the two versions. However, the issue in dispute was not really on the difference as to the original contract value or the value of the contract after adjustment. The issue in dispute was concerning with whether the whole sum of RM3,136,293.25 should be paid or that, as argued by the defendant, after deducting the dead/rejected trees, that the sum of RM58,417.57 should only be paid. In the present case, the court found in favour of the defendant. Therefore, the court rejected the plaintiff's contention on this issue (see paras 81–82).
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- I (6) The terms of the consent order did not constitute an unequivocal admission by the defendant that the full sum of RM4,237,086.27 was due and payable to the plaintiff. The terms of the consent order required that the terms of the final payment must be undertaken through the process of issuance of the final account as provided under the terms of the contract. The amount payable must be determined by the defendant's representative in accordance with the amount of actual work done, including any work undertaken during the defect liability period (see paras 86 & 88–89).

- (7) The defendant's witnesses were those who were directly involved in the project and were involved in the assessment of the dead trees, and the replacement process undertaken by the plaintiff during the defect liability period. Their evidence was consistent with the documentary evidence and credible based on the circumstances of the case. On the balance of probabilities, the court found that the evidence of the defendant's witnesses was true as they were consistent with contemporaneous documents (see paras 92 & 94).

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[Bahasa Malaysia summary]

Plaintif dan defendan telah menandatangani kontrak ('kontrak tersebut') berhubung projek bertajuk 'The proposed Planting and Maintaining of Forest Species Works inclusive of infrastructural and landscaping works for Taman Rimba Alam at Precincts 14 & 15 Putrajaya for Perbadanan Putrajaya' ('projek tersebut') yang telah diberikan oleh plaintiff kepada defendan. Pertikaian timbul apabila defendan gagal membayar baki bayaran berhubung projek tersebut. Akibatnya, plaintiff memfailkan permohonan ini ('tuntutan plaintiff') memohon; antara lain: (a) perintah pengisytiharan bahawa jumlah RM3,136,293.25 ('jumlah tertunggak') adalah jumlah yang terhutang dan perlu dibayar di bawah Perintah Persetujuan bertarikh 9 November 2011 ('perintah persetujuan tersebut'); (b) perintah pengisytiharan bahawa draf akaun akhir yang disediakan oleh defendan adalah tidak sah, telah dipertikaikan, dan tidak boleh dikuatkuasakan; dan (c) perintah pengisytiharan bahawa jumlah RM58,417.57 yang terkandung dalam draf akaun akhir yang tidak dipersetujui adalah jumlah yang tidak sah, dipertikaikan dan tidak boleh dikuatkuasakan. Defendan berhujah bahawa jumlah RM3,077,878.68 perlu ditolak daripada jumlah tertunggak tersebut menurut perintah perubahan kerja No 15 ('perintah perubahan kerja tersebut') yang dikeluarkan oleh defendan selepas pengeluaran sijil perakuan siap kerja ('SPSK') dan sijil siap memperbaiki kecacatan ('SSMK') oleh wakil defendan. Perintah perubahan kerja tersebut dikeluarkan kononnya untuk pokok yang mati, kos penggantian, dan penyelenggaraan pokok yang diganti. Sebagai tindak balas kepada hujahan defendan, plaintiff berhujah bahawa oleh kerana defendan mengeluarkan SSMK, semua kerja telah disiapkan olehnya, oleh itu, perintah perubahan kerja tersebut telah dikeluarkan secara salah setelah tujuh bulan SSMK dikeluarkan. Isu-isu utama yang perlu ditentukan ialah sama ada defendan berhak mengeluarkan perintah perubahan kerja tersebut dan sama ada potongan yang dibuat dalam perintah perubahan kerja tersebut adalah wajar dalam keadaan kes ini. Plaintiff juga telah membangkitkan beberapa isu lain berhubung dengan: (i) perbezaan angka dalam penyata akaun akhir berkenaan draf akaun akhir plaintiff dan draf akaun akhir defendan; (ii) kesan perintah persetujuan tersebut; dan (iii) kredibiliti saksi-saksi.

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Diputuskan, menolak tuntutan plaintiff dengan kos sebanyak RM30,000 tertakluk kepada alokatur:

- A (1) Tidak dapat dinafikan bahawa selepas SPSK dikeluarkan, plaintif mengaku dalam suratnya bertarikh 31 Mac 2010 bahawa terdapat kira-kira 15,958 pokok yang mati atau ditolak oleh defendan. Plaintif mengakui bahawa pokok-pokok ini tidak diterima oleh defendan, dan ia memberikan butiran program kerja yang akan dilakukan oleh plaintif
- B untuk membetulkan kecacatan tersebut mengikut terma kontrak. Selanjutnya, dalam dokumen tender, plaintif menyatakan bahawa 'We are responsible for replacing any plants which fail to survive as a result of inadequate operations, poor workmanship or poor quality of plant material prior to completion or any other reason during the operation of the contract'. Oleh itu, defendan adalah betul bahawa plaintif
- C dikehendaki menggantikan pokok yang mati atau mana-mana pokok yang ditolak di bawah terma kontrak semasa tempoh liabiliti kecacatan (lihat perenggan 37–39).
- D (2) Apa yang penting ialah sama ada sijil SSMK adalah muktamad dan menggambarkan bahawa kerja tersebut telah disiapkan, dan defendan harus membayar plaintif untuk jumlah yang dituntut. Mahkamah berpendapat bahawa SSMK tersebut tidak muktamad dan mengikat
- E tetapi hanyalah bukti prima facie bagi kerja yang dilakukan ('bukti prima facie'). Kedudukan prima facie ini boleh disangkal oleh defendan sehingga satu tahap apabila sijil muktamad dikeluarkan. Defendan tidak berhak mengeluarkan apa-apa perintah perubahan kerja selepas SSMK
- F dikeluarkan melainkan dipersetujui oleh plaintif. Sijil akhir dikeluarkan berdasarkan kerja sebenar yang dilakukan oleh plaintif sehingga memuaskan hati defendan. Selanjutnya, klausa 46.1 dan klausa 49.1 menunjukkan bahawa sijil-sijil yang dikeluarkan oleh wakil pihak-pihak bukanlah sijil-sijil akhir dan muktamad (lihat perenggan 52 & 56).
- G (3) Defendan telah mengeluarkan perintah perubahan kerja tersebut selepas SSMK dikeluarkan olehnya dan secara amnya, seperti yang dinyatakan di atas, kontraktor tidak terikat dengan perintah perubahan yang
- H dikeluarkan selepas tarikh SSMK. Bagaimanapun, mahkamah mendapati fakta kes ini menunjukkan sifat sebenar dokumen tersebut bukanlah perintah perubahan kerja tetapi merupakan perakuan untuk mengesahkan jumlah kerja sebenar yang dilakukan oleh plaintif. Perkara ini turut disahkan dalam senarai pokok yang ditanam yang dikemukakan oleh defendan. Senarai tersebut dan perintah perubahan kerja tersebut adalah konsisten antara satu sama lain dan menunjukkan bahawa hanya 82,573 pokok telah ditanam dan baki 13,390 pokok tidak ditanam semula (lihat perenggan 74–75).
- I (4) Defendan mesti mengemukakan keterangan untuk menyangkal bukti prima facie tersebut. Dalam kes ini, mahkamah mendapati defendan telah mengemukakan dokumen yang banyak untuk menunjukkan bilangan pokok yang ditanam oleh plaintif dan diterima dan ditolak oleh

- defendan. Oleh itu, menurut ss 101 dan 102 Akta Keterangan 1950, beban pembuktian beralih kepada plaintif untuk menunjukkan bahawa ia telah menjalankan kerja tersebut. Walau bagaimanapun, tiada keterangan oleh plaintif untuk menunjukkan bahawa ia telah menanam atau menggantikan pokok mati atau pokok yang telah ditolak, oleh itu, plaintif telah gagal membuktikan hujahannya. Oleh yang demikian, plaintif tidak berhak untuk menuntut jumlah kontrak penuh kerana pokok-pokok ini tidak ditanam dan tidak diselenggara oleh plaintif dengan sewajarnya mengikut terma kontrak. Mahkamah memutuskan bahawa plaintif hanya layak dibayar jumlah RM58,417.57 (lihat perenggan 60–61, 64–65, 67 & 76–77). A
- (5) Berkenaan dengan perbezaan dalam angka dalam penyata akaun akhir, mahkamah bersetuju bahawa terdapat perbezaan antara kedua-dua versi. Walau bagaimanapun, isu yang dipertikaikan sebenarnya bukan mengenai perbezaan nilai kontrak asal atau nilai kontrak selepas pelarasan. Isu yang dipertikaikan ialah sama ada jumlah keseluruhan sebanyak RM3,136,293.25 yang perlu dibayar atau, seperti yang diujahkan oleh defendan, selepas menolak pokok mati/ditolak, bahawa hanya jumlah RM58,417.57 yang perlu dibayar. Dalam kes ini, mahkamah telah membuat keputusan yang memihak kepada defendan. Oleh itu, mahkamah menolak hujahan plaintif mengenai isu ini (lihat perenggan 81–82). B
- (6) Terma-terma perintah persetujuan tersebut tidak membentuk pengakuan yang jelas oleh defendan bahawa jumlah penuh RM4,237,086.27 adalah jumlah yang terhutang dan perlu dibayar kepada plaintif. Terma perintah persetujuan tersebut menghendaki syarat pembayaran akhir mesti dilaksanakan melalui proses pengeluaran akaun akhir seperti yang diperuntukkan di bawah terma kontrak. Amaun yang perlu dibayar mesti ditentukan oleh wakil defendan mengikut jumlah kerja sebenar yang dilakukan, termasuk apa-apa kerja yang dilakukan dalam tempoh liabiliti kecacatan (lihat perenggan 86 & 88–89). C
- (7) Saksi-saksi defendan adalah mereka yang terlibat secara langsung dalam projek tersebut dan terlibat dalam penilaian pokok mati, dan proses penggantian yang dilakukan oleh plaintif semasa tempoh liabiliti kecacatan. Keterangan mereka adalah konsisten dengan keterangan dokumentari dan boleh dipercayai berdasarkan keadaan kes. Di atas imbangkan kebarangkalian, mahkamah mendapati bahawa keterangan saksi-saksi defendan adalah benar kerana ia konsisten dengan dokumen-dokumen yang dikemukakan (lihat perenggan 92 & 94). D
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A Cases referred to

Abracadabra Speculative Ventures Inc v Colin David Patterson [2016] 1 LNS 1094, HC (refd)

Dahan Cipta Sdn Bhd & Anor v Yong Tshu Khin & Ors and other appeals [2017] 6 MLJ 638; [2017] 1 CLJ 257, CA (refd)

B *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)

Lee Ing Chin@Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

C *Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors* [2008] 6 MLJ 839; [2008] 5 CLJ 130, HC (refd)**Legislation referred to**

Evidence Act 1950 ss 101, 102, 103

D *Mohd Iskandar bin Ismail (Rafizal bin Ahamaddin with him) (Shahrul & Rafizal) for the plaintiff.*

Mohd Rosly Khady bin Mohd Ayub Khan (Helmi bin Hamzah and Efa Sakinah bt Razak with him) (Hisham Sobri & Kadir) for the defendant.

E Mohd Arief JC:

INTRODUCTION

- F** [1] The plaintiff seeks the following orders from this court:
- (i) a declaratory order that the sum of RM3,136,293.25 is the sum due and payable under the consent order dated 9 November 2011;
 - (ii) a declaratory order that the draft final account prepared by the plaintiff is not valid, is disputed, and is unenforceable;
 - (iii) a declaratory order that the sum of RM58,417.57 contained in the draft final account that was not agreed upon is a sum that is not valid, disputed, and is not enforceable;
 - (iv) interest at the rate of 5%pa on prayer (i) from the date of the filing of the writ to the date of full realization of the same; and
 - (v) costs.

I BACKGROUND FACTS

- [2] The plaintiff's claim is premised on the following facts:
- (a) the defendant had awarded the plaintiff by way of the letter dated 6 May 2003 a project entitled "The proposed Planting and Maintaining of

Forest Species Works inclusive of infrastructural and landscaping works for Taman Rimba Alam at Precincts 14 & 15 Putrajaya for Perbadanan Putrajaya; and

- (b) parties then executed a contract dated 28 October 2003. The material terms of the agreement are as follows:

- (i) the defendant (Perbadanan) covenants to pay the plaintiff in consideration and completion of the works and making good of any defects whatsoever to the works sums of RM58,757,209.25 or such other sum as shall become payable under and at the times and in the manner specified in the conditions of contract:

- (ii) special provisions to the conditions of contract — Part E of the contract document:

Clause 12.6

12.6 PAYMENT

Payment for all plants will be made progressively as follows:

- (i) Plant 40%

The full amount represented in this percentage shall be paid progressively as the Contractor fulfills his obligations to plant during Construction Period

- (ii) Pre-Maintenance. 20%

The full amount represented in this percentage shall be paid progressively as the Contractor fulfills his obligations to maintain the plants during Construction Period and before issuance of Certificate of Practical Completion (CPC)

- (ii) Post-Maintenance 40%

The full amount represented in this percentage shall be paid progressively as the Contractor fulfills his obligations to maintain the plants during the 24 Months Maintenance Period or Defects Liability Period (DLP)

Note:

1. The full amount payable for each of the plant in the percentage stated above shall:

- i) Be paid upon the Contractor fulfilling his obligations as contained in the Specification and the Maintenance Programme which shall be prepared by the Contractor and approved by PP, and

ii) Include costs for the replacement of any of the plant, which at any time during the subsistence of this contract, fails to meet the requirements of the Perbadanan

- A** iii) If the Contractor fails to maintain the plants during the construction period, the Perbadanan shall be entitled to deduct the pre-maintenance costs from any sums due and payable to the Contractor
- B** 2. In the event that the Contractor fails, ignores and/or refuses to replace any plant rejected by Perbadanan or maintain any plant (trees, palm, shrub and turfing) as per the approved Specification and the Maintenance Programme, then the Perbadanan shall, after giving seven (7) days written notice to the Contractor, be entitled to appoint a third party to replace or maintain such plant. In such an event, the
- C** Perbadanan shall be entitled to deduct all costs incurred by such exercise from any sums due and payable to the Contractor.
- Notwithstanding the above, where the third party only replaces the plant, the maintenance and the well-being of the plant shall be the responsibility of the Contractor.
- D** Conditions of Contract
- Clause 4
4. SCOPE OF CONTRACT
- E** 4.1 Scope of Contract
- The Contractor shall upon and subject to these Conditions construct and complete Works shown upon the Contract Drawings and described by or referred to in the Specifications and in the Articles of Agreement and these Conditions in compliance therewith, using
- F** materials, goods and workmanship of the quality and standards therein specified. The Contractor shall also make good any defect, imperfection, shrinkage or any other fault whatsoever which may appear during the Defects Liability Period in accordance with Clause 45 hereof.
- G** Clause 5
5. P.R.'S INSTRUCTIONS
- 5.1 Definition
- H** The PR may in his absolute discretion and from time to time issue further drawings, details and/or written instructions (all of which are hereafter collectively referred to as 'P.R.'s instructions') in regard to:
- (i) the variation as referred to in Clause 24 hereof;
- I** (ii) any discrepancy in or between the Contract Documents as referred to in Clause 82 hereof;
- (iii) the removal from the Site of any materials or goods brought thereon by the Contractor and the substitutions of any other materials or goods therefor;

- (iv) the removal and/or re-execution of any works executed by the Contractor; **A**
- (v) the dismissal from the Works of any person mentioned in Clause 22 hereof employed thereupon;
- (vi) the opening up for inspection of any work covered up as referred to in Clause 9.2 hereof; **B**
- (vii) the amending and making good of any defects whatsoever under Clause 45,
- (viii) any matter which is necessary and incidental to the carrying out and completion of the Works under this Contract; **C**
- (ix) any matter in respect of which the P.R. is expressly empowered by this Contract to issue instructions.
- 5.2 Compliance with P.R.'s instructions **D**
- The Contractor shall (subject to Clause 53 hereof) forthwith comply with all instructions issued to him by the P.R. If within seven (7) days after receipt of a written notice from the PR requiring compliance with an instruction the Contractor does not comply therewith, then the P.R. without prejudice to any other rights or remedies available to the Perbadanan under this Contract may undertake the work departmentally or employ and pay a contractor or other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the Contractor by the Perbadanan or the PR on its behalf as a debt or may be deducted by the Perbadanan or the P.R. on its behalf from any monies due or to become due to the Contractor under this Contract 5.3 P.R.'s instructions to be in writing **E**
- All instructions issued by the P.R. shall be issued in writing. Any instruction issued orally shall be of no immediate effect, but shall be confirmed in writing by the Contractor to the P.R. within seven (7) days after receipt of the oral instruction aforesaid, and if not dissented from in writing by the PR to the Contractor within seven (7) days from receipt of the Contractor's confirmation shall take effect as from the expiration of the latter said seven (7) days. Provided always that if the P.R. within seven (7) days of giving such an oral instruction shall himself confirm the same in writing, then the Contractor shall not be obliged to confirm as aforesaid, and the said instruction shall take effect as from the date of the P.R.'s confirmation. **F**
- 5.4 Claim for compliance with instructions **G**
- If in compliance with the PR's instruction as aforesaid involves expense or loss beyond that reasonably contemplated by the Contractor for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, then unless the same were **H**
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- A** issued owing to some breach of this Contract by the Contractor, the Contractor shall within one (1) month of receipt of such instruction, give notice in writing of his intention to claim for such expense or loss to the P.R. together with an estimate of the amount of such expense and/or loss, subject always to Clause 48,1 hereof.
- B** Clause 24.1
24.1 Power to order and subsequent confirmation
The P.R. may at his absolute discretion issue instructions requiring a variation and he may confirm in writing pursuant to Clause 53 hereof any oral instruction requiring a variation to the Works. No variation required by the P.R. or subsequently confirmed by him shall vitiate this Contract.
- C**
- D** Subject to the foregoing, the Contractor may propose in writing to the P.R. any modifications or alternative design to the Works or to any part thereof or to any equipment, materials and goods to be incorporated therein which in the Contractor's opinion will improve the appearance or quality of the Works, the economy of the construction, the bringing forward of the Date for Completion as stated in the Appendix or the efficiency of use of completed Works: PROVIDED ALWAYS THAT
- E** such modifications do not cause additional cost to the Perbadanan and does not require an extension of time to the time for completion of the Works Upon receipt of such a proposal, the PR may approve or reject the Contractor's proposed modifications and failure by the PK to respond within fourteen (14) days of the Contractor's proposal shall be deemed to be a rejection. If approved by the PR, an instruction requiring variation may be issued in accordance with this Clause 24.
- F** application of this clause shall in no way permit the Contractor to suspend or delay his performance of the Works or any part thereof pending the P.R's review of the Contractor's proposal.
- G** Clause 25.1
25. VALUATION OF VARIATIONS
25.1 Measurement
- H** All variations authorised as herein provided or subsequently confirmed by the PR in writing shall be measured and valued by the P.R., who shall give to the Contractor or his site agent an opportunity of being present at the time of such measurement and of taking such notes and measurement as the Contractor may require. Should the Contractor or his site agent not attend or neglect to attend, then the measurement made by the P.R. or approved by him shall be taken as correct measurement of the work. The Contractor shall be supplied with a copy of the measured bill.
- I**
- Clause 39.1
39. COMPLETION OF WORKS

39.1 Date for Completion

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Subject to any requirements as to the completion of any section of part of the Works under Clauses 383 and 41 before the completion of the whole of the Works, the Contractor shall complete the whole of the Works on or before, the 'Date Completion' stated in the Appendix or such extended time as may be allowed under Clause 43 hereof.

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Clause 39.2

39.2 Certificate of Practical Completion

When the whole of the Works have reached practical completion according to the provision of this Contract and to the satisfaction of the

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P.R. the date of such completion shall be certified by him and such date shall be the date of the commencement of the Defects Liability by him and such date shall be the date of the commencement of the Defects Liability Period as provided in Clause 45 hereof. The certificate issued under this Clause shall be referred to as the 'Certificate of Practical Completion'.

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Clause 42.3

42.3 Certificate of making goods defects.

At the end of the Defects Liability Period of the relevant parts and if in the opinion of the P.R. any defects, imperfections, shrinkage or any other fault whatsoever in the relevant part which he may have required to be made good under Clause 45.1 and 45.2 hereof, shall have be made good by the Contractor, the P.R. shall issue a certificate to that effect.

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Clause 45.1

4.5 Defect after completion

45.1 Defects Liability period

At any time during the Defects Liability Period as stated in the appendix hereto (or if none stated the period is twelve (12) months from the date of practical completion of the Works), any defect imperfection, shrinkage or any other fault whatsoever which may appear and which are due to materials or goods or workmanship not in accordance with this Contract or not in compliance with the Selangor Uniform Building By-Laws 1986, shall be notified by the P.R. in a written instruction to the Contractor who shall within a reasonable time to be specified therein by the PR. make good such defects, imperfections, shrinkage or any other fault whatsoever at the Contractor's own costs.

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Clause 45.2

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45.2 Schedule of Defects

Notwithstanding, Clause 45.1 above, any defect, imperfection, shrinkage or any other fault whatsoever which may appear during the

- A** Defects Liability Period to be made good by the Contractor, shall be specified by the PR in the Schedule of Defects which he shall deliver to the Contractor not later than fourteen (14) days after the expiration of the Defects Liability Period. The defects, imperfections, shrinkage or any other fault whatsoever specified in the Schedule of Defects shall be made good by the Contractor at his own costs and to be completed within a reasonable time but in any case not later than three (3) months after the receipt of the said Schedule Provided that the P.R. shall not be allowed to issue any further instruction requiring making good of any defect, imperfection, shrinkage or any other fault whatsoever (other than due to non-compliance with the Selangor Uniform Building By-Laws 1986) after the issue of the said Schedule of Defects or after fourteen (14) days from the expiration of the said Defects Liability Period, whichever is the later.
- B**
- C**
- Clause 45.5
- D** 45.5 Certificate of Making Good Defects.
- When in the opinion of the PR the imperfections, shrinkage or any other fault whatsoever which he is required to Contractor has made good the defects, make good under Clauses 45.1 or 45.2, or both, the P.R. shall issue a certificate to that effect, and the date named in such certificate shall be the date on which the Contractor has completed making good such defects, imperfections, shrinkage or any other fault whatsoever. The said Certificate shall be referred to as the 'Certificate of Making Good Defects'.
- E**
- Clause 48.1
- F** 48. FINAL CERTIFICATE
- 48.1 Submission of claim. documents
- So soon as is practicable but not later than three (3) months after practical completion of the Works, the Contractor shall submit full particulars of all claims made by him under Clause 5.4 and/or 44 together with any documents, supporting vouchers and any explanation and calculations including documents relating to the accounts of Nominated Subcontractors or Nominated Suppliers, which may be necessary to enable the Final Account to be prepared by the PR provided always the Contractor had given the notice of claim in writing within the stipulated time or times in the said provisions.
- G**
- H**
- Clause 48.2
- 48.2 Final Certificate
- I** Within three (3) months after the expiry of the Defects Liability Period for the whole of the Works or three (3) months after the issue of the last Certificate of Making Good Defects under Clause 45 hereof, whichever is the later, the P.R. shall issue the Final Certificate.
- Clause 48.3

48.3 Sums to be certified in the Final Certificate

A

The Final Certificate shall be supported by documents showing the P.R.'s final valuation of Works in accordance with the terms of this Contract and after setting out or allowing for all payments or other expenditure of the Perbadanan or any permitted deductions made by the Perbadanan or the P.R. on its behalf, shall state any final balance due from the Perbadanan to the Contractor or from the Contractor to the Perbadanan, as the case may be, which shall thereupon become the debt payable. Such certificate shall also take account of any outstanding permitted deductions not yet made by the Perbadanan under the terms of this Contract whether by way of liquidated damages or otherwise

B

C

Clause 49.1

49. EFFECT OF P.R.'s CERTIFICATES

49.1 Effect of P.R.'s certificates

D

No certificate of the PR under any provision of this Contract shall be considered as conclusive evidence as to the sufficiency of any work, materials or goods to which relates, nor shall it relieve the Contractor from his liability to amend and make good all defects, imperfections, shrinkages, or any other faults whatsoever as provided by this Contract. In any case, no certificate of the P.R. shall be final and binding in any dispute between the Perbadanan and the Contractor if the dispute is brought whether before an arbitrator or in the Courts.

E

[3] Parties subsequently reduced the contract amount due to changes to the amount of work to be done by the plaintiff for the said project. The amount was reduced to the total sum of RM41,686,265.27. These changes were made in accordance with the variation orders issued by the defendant to the plaintiff.

F

[4] Via letter dated 4 October 2008, the defendant's representative had apparently chastised the plaintiff concerning the contents of the latter's letter dated 12 September 2006 that was not produced by either party. However, this court notes that the defendant did state:

G

A general understanding of issuance of Certificate of Practical Completion (CPC) is that the contractor has completed all his obligations in the contract.

H

We are of the opinion that the issuance of the CPC which is inter-related with the completion of your obligations under the contract and therefore cannot agree with the conclusion in Paragraph 3 of your letter.

[5] Via letter dated 18 April 2008, the defendant had subsequently issued a Certificate of Partial Completion for the community forest park. The defendant had also issued a Certificate of Partial Completion for the North Easter Forest Corridor and Pond 3 Surrounding the Main Core Forest on 2 April 2009.

I

- A** [6] The defendant via its letter dated 5 November 2009 had issued the certificate of practical completion to the plaintiff. In the same letter, the plaintiff was also reminded that the defendant must ensure that ‘all defects as stated in the List of Defects’ which was issued to the plaintiff must be remedied or is made good to the satisfaction of the defendant.
- B**
- C** [7] Two Interim Payment Certificates were issued by the defendant for the sum of RM2,449,358.49, RM283,245.82, and RM853,547.20 each dated 15 July 2011 and in August 2011 each bearing numbers IPC/V/0032, IPC/V/0033, and IPC/V/0034.
- D** [8] A dispute as to the amounts outstanding under the terms of the above-referred contract. This could be seen in the letters exchanged between the plaintiff and the defendant dated 26 December 2009, 25 January 2010, 31 March 2010. The plaintiff then filed a writ bearing number S21-188 of 2010 against the defendant on 15 July 2010. In the meantime, parties continued to negotiate and discussed the disputed works as seen in the letters dated 19 July 2010, 5 August 2010, 14 September 2010, 21 July 2011, and 27 July 2011.
- E** [9] Parties also discussed on the defects list as seen in the letters dated 5 September 2011, 13 September 2011 and 15 September 2011. This eventually led to the letter dated 13 October 2011 issued by the plaintiff to the defendant’s representative informing the latter that:
- F** defect liability period will be ending on 15-10-2011, we wish to inform you that we have been rectified and completed all the defect works at Main Core Forest. We wish to call for the handover inspection and subsequently apply for the issuance of the Certificate of Making Good Defect for Main Core Forest.
- G** [10] Parties subsequently agreed to enter into a consent order dated 9 November 2011 where they agreed that the defendant will pay the plaintiff: (a) the sum of RM2,499,358.49 and that (ii) the defendant will pay the plaintiff the sum of RM4,237,086.27 after (a) completion of the Defects of the Liability Period and the (ii) issuance of the Final Account that is agreed to by
- H** the plaintiff and the defendant.
- I** [11] It is common ground between parties that the plaintiff did receive the sum of RM40,999,330.51, payments due under interim certificates no 1 to no 34, and RM2,499,358.49, the sums stated under the above consent order.
- [12] The plaintiff then issued a letter to the defendant dated 20 October 2011 forwarding a copy of the final claim for the sum of RM3,136,293.25.
- [13] The defendant did issue a certificate of making good defects to the

plaintiff dated 5 January 2012 in accordance with cl 45.5 of the contract.

A

[14] By letter dated 27-2-2012, the plaintiff issued a letter to the defendant seeking payment of the sum of RM3, 136, 293.25.

[15] However, the defendant refused to pay the sum of RM3, 077, 875.68 and was only willing to pay the sum of RM58,417.57. The defendant alleges that the said sums of RM3,077,875.68 should be deducted from the total sums outstanding to the plaintiff pursuant to variation order No 15 Variation Order No 15 was issued by the plaintiff after the issuance of the certificate of practical completion and Certificate of Good Making Defects.

B

C

[16] The defendant had issued a letter dated 21 June 2012 enclosing a draft of the final account for the approval for the plaintiff. The statement of final account deducts the sum of RM3,077,875.68 from the final sum due to the plaintiff, thus leaving only the sum of RM58,417.57 due and payable to the plaintiff from the defendant. The said sum of RM3,077,875.68 is the sum reflected in the variation order number 15 which I had referred to in para 9 earlier. The variation order was issued allegedly for dead trees, costs of replacement, and maintenance of the trees replaced.

D

E

[17] This was followed with a letter dated 6 July 2012 issued by the plaintiff disagreeing with the draft statement of final account prepared by the defendant. The defendant also issued letters dated 11 January 2013, and 4 January 2016.

F

[18] A meeting was held between, inter alia, representatives of the plaintiff and the defendant on 5 December 2017. The notes of the meeting indicate that the defendant confirms that the remaining contract sum unpaid is to the sum of RM3,136,293.25 but is subject to the confirmation of the final account.

G

[19] The defendant refused to reconsider its position and reiterated that it is entitled to deduct the sum of RM3,077,875.68 and that only the sum of RM58,417.57 should be paid to the plaintiff as seen in the letter dated 19 December 2018.

H

[20] Subsequently, the plaintiff rejected the position adopted by the defendant as seen in the letter dated 3 January 2019. I note that the plaintiff did provide the details of its claim which are as follows:

I

(i) Original Contract Sum	RM58,757,209.25
(ii) Variation Orders (Omissions deducted)	RM17,070,943.98
Reduced Contract Sum	RM41,686,265.27

A	(iii) Compensation agreed	RM 2,4449,358.49
	New Contract Sum	RM44,135,623.76
	(iv) Previous payments made by the Defendant (Interim Payment Certificates No 1 to 31)	RM37,413,179.00
B	(v) Previous payments made by the Defendant (Interim Payment Certificate No 32)	RM2,449,358.49
	(vi) Previous payments made by the Defendant (Interim Payment Certificate No 33)	RM283,245.82
	(vii) Previous payments made by the Defendant (Interim Payment Certificate No 34)	RM853,547.20
C	(viii) Balance unpaid	RM3,136,293.25

[21] The plaintiff further stated in the aforesaid letter that as the defendant did issue a certificate of good making defects (CMGD) on 12 December 2011, all works have been completed by it. It also alleges that the variation order No 15 was wrongly issued seven months after the CMGD was issued. This could also be seen in the letters dated 6 July 2012, 11 January 2013, 27 February 2012, 4 January 2016, and 3 December 2015.

E APPLICABLE CONTRACT MECHANISMS DETERMINING PAYMENTS, COMPLETION OF WORKS, AND VARIATION ORDERS

[22] It is important that explain the terms of the contract and the mechanism applicable in the issuance of: (i) payments for work done by the plaintiff; (ii) certificate of completion; (iii) certificate of good making defects; and (iv) variation orders. These are material factors that will assist me in determining whether the plaintiff should be entitled to be paid the sum of RM3,136,293.25 or that only the sum of RM58,417.57 is due and payable as alleged by the defendant.

G
(i) *Payment for work done*

[23] For the plaintiff to be entitled to be paid for any work done by it, the plaintiff must comply with cll 47.1 to 48.4 of the contract.

[24] The process is summarised as follows:

- I
- (a) the plaintiff shall submit to the defendant's representative a monthly statement showing the estimated value of the works executed, including any variations, delivery to or adjacent to the site of any unfixed materials or goods for the project;
 - (b) the defendant's representative shall then ascertain the value of the works, or the materials supplied and issue an interim payment certificate. Upon

issuance of the said interim payment certificate, the defendant shall then pay the plaintiff the sums certified within 30 days from the issuance of the said certificate;

A

- (c) three months after the issuance of the certificate of practical completion, the plaintiff shall then submit full particulars of all claims made by him together with document, supporting vouchers and any explanation justifying such calculations; and

B

- (d) the defendant's representative shall then issue the final certificate after the issuance of the CMGD. Once the final certificate is issued the full sums shall be paid to the plaintiff by the defendant.

C

(ii) Variations

[25] Regarding variations, the contract provides that any variation of any work to be performed by the plaintiff must be undertaken through written instructions by the defendant's representative in accordance with cl 24.1 of the contract.

D

[26] Variation of the works would include addition or omission or substitution of any work to be undertaken by the plaintiff. The valuation of such variation must be undertaken in the presence of the plaintiff's representative to enable the plaintiff an opportunity to understand the variation and the measurement of the value made by the defendant's representative. This is provided for in cl 25.2 to 25.3 of the contract.

E

F

(iii) Certificate of completion, and Certificate of good making defects

[27] Once the whole of the project has reached practical completion in accordance with cl 39.3 to the satisfaction of the defendant's representative, then the defendant is required to issue a certificate of practical completion.

G

[28] The certificate is only issued if, inter alia: (i) the defendant have full, proper, and beneficial use of the works; (ii) the works have passed any commissioning tests required; (iii) the works have passed any commissioning tests; and (iv) the works have been made available to the defendant in a condition enabling the defendant to obtain a certificate of fitness. This could be seen in cl 39.1 to 39.3 of the contract.

H

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[29] Once the certificate of practical completion is issued, then the time frame for the defect liability period starts to kick in. The defect liability period is 12 months from the date of the issuance of the certificate of practical completion.

- A** [30] Within three months from the expiration of the defect liability period, the defendant's representative shall then issue a Schedule of Defects that must be delivered to the plaintiff. This Schedule of Defects must contain any defects, imperfections, shrinkages, or any other fault to the plaintiff's work. Once the plaintiff receives such a list, it must then undertake repairs or make good to the
- B** items listed therein within three months after receipt.

[31] Once the defendant's representative is satisfied with the works done by the plaintiff based on the said Schedule of Defects, it must then issue a CMGD.

- C** [32] The above could be seen in cll 45.1 to 45.6 of the contract.

- [33] Note however that issuance of the certificate of making good defects does not neutralise any obligation owed by both plaintiff and the defendant under the terms of the contract prior to the issuance of the said certificate. This is provided in cl 46.1 of the contract.
- D**

(iv) Duty to maintain and replace dead trees on the plaintiff

- E** [34] I also find that it is irrefutable that the plaintiff is contractually required to maintain the plants after they were supplied and planted in accordance with the terms of the contract. I refer to the following evidence referred to by the plaintiff:

- F** (a) minutes of meeting dated 19 April 2006 — Progress Meeting No 56:
- 13.2 The Consultant Advised KSSB to quickly identify the local supplier to source for replacement of dead trees.

13.3 KSSB to plan and source from others nursery beside GLSB for the dead tree's replacement before CPC

- G** (b) plaintiff's letter to the defendant's representative, KLCC Properties, dated 26 December 2009:

H With reference to the above, we would like to highlight here that for the overall of TRA, the mortality rate was at 16% or more exactly 15, 598 numbers of trees were found dead/rejected during our final handover inspection.

Therefore, we would like to make an appeal for the reduction of the replacement of this total of dead trees.

- I** We will be delighted and honored if you could consider and granted our application to reduce the quantity of trees to be replace only by 6% of overall planted trees.

- (c) plaintiff's letter dated 31 March 2010 to defendant's representatives, KLCC Property:

With reference to the above matter attached herewith a Work Programme and a List of Replacement of Rejected/Dead Trees for Norther Easter Forest Corridor (NEFC) and Main Core Forest Corridor (MCF) at Taman Rimba Alam as per requested.

A

- (d) plaintiff's letter dated 25 January 2012 to the defendant's representatives KLCC Property:

B

Kami telah pun dengan sedaya upa amengganti bilangan pokok-pokok mati yang terus berlaku di Taman Rimba Alam disebabkan factor semulajadi, kejadian rebut dan kebakaran, ketidaksesuaian lokasi, keperluan dan sepsis pokok hutan serta vandalisma.

C

- (e) this was also confirmed by the plaintiff's witness during cross-examination:

RA: Setuju tak saya cadangkan bahawa tiada wakil Plaintiff dalam penilaian yang dibuat dalam sebelum pengeluaran APK 15 ini?

D

HASLINDA: Setuju.

RA: Setuju. Setuju, setuju atau tidak saya cadangkan bahawa dokumen ini disijilkan tanpa persetujuan dan pengesahan wakil Plaintiff sebagaimana APK 1 sehingga APK 147

E

HASLINDA: Setuju.

RA: Setuju. Setuju saya cadangkan bahawa APK 15 ini dikeluarkan secara unilateral kerana tiada site inspection dengan wakil Plaintiff?

HASLINDA: Inspection telah dilaksanakan. RA : Dikeluarkan secara unilateral. HASLINDA: Inspection telah dilaksanakan.

F

RA: Tak, maksud saya, setuju atau tidak APK 15 ini dikeluarkan secara unilateral kerana tiada site inspection bersama wakil Plaintiff?

HASLINDA: Setuju

G

[35] The defendant thereafter issued various reminders to the plaintiff to complete the works to replace the dead or rejected trees. This is seen in the letters issued by the defendant's representatives dated 5 August 2010, 25 January 2010, and 13 November 2011.

H

[36] As I said earlier, the plaintiff then instituted proceedings against the defendant which eventually led to the consent order dated 9 November 2011. Parties also issued further correspondence and had various discussions to reach an amicable settlement as to the amount claimed by the plaintiff which only led to an impasse. The plaintiff insisted that it was entitled to the full sums claimed whereas the defendant contends that it was entitled to deduct the sums stated in variation order No 15.

I

A [37] Another important fact that I have taken into account is that in the tender document, which forms part and parcel of the terms of the contract, the plaintiff did state under the title ‘Method of Statement for maintenance’ that ‘We are responsible for replacing any plants which fail to survive as a result of inadequate operations, poor workmanship or poor quality of plant material prior to completion or any other reason during the operation of the contract’.

C [38] It is also irrefutable that after the issuance of the certificate of practical completion on 5 November 2009, the plaintiff admitted in its letter dated 31 March 2010 that there were about 15,958 trees that were either dead or were rejected by the defendant. The plaintiff admitted that these trees were not accepted by the plaintiff, and it gave details of the work programme that the plaintiff will undertake to rectify the said defects in accordance with the terms of the contract.

D [39] Therefore, I am of the view that the defendant is correct that the plaintiff is required to replace the dead trees or any rejected trees under the terms of the contract during the defect liability period. The explanation given by the plaintiff is not correct and is not supported by the terms of the contract and even by the plaintiff’s own conduct. Otherwise, it would not have made the above promises at the tender stage and as seen in the correspondence shown by the defendant.

F [40] Such an interpretation of the terms of contract, based on subsequent conduct of parties, can be seen in the decision of Nantha Balan JC in *Abracadabra Speculative Ventures Inc v Colin David Patterson* [2016] 1 LNS 1094.

G [41] In that case, one of the issues that had to be decided by the learned judge was whether the conduct of parties post-contract could be utilised to determine the meaning to be attributed to a particular clause that appears in the contract. Although as a general rule, a court of law should not attribute meanings based on subsequent conduct of parties and that the meaning should be looked at objectively at the time the contract was entered, but subsequent could be looked at when it is shown that parties agreed that the term of a contract would have a particular meaning.

[42] Justice Nantha Balan stated:

I In certain limited situation or exceptional circumstances where there is no clarity in a term of a contract which is under scrutiny, a court is entitled to examine the post contractual conduct of the parties where it appears that parties have by their subsequent conduct given a term in an agreement a particular meaning. See: *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors* [2005] 2 MLJ 32; [2005] 1 CLJ 416 at p 419 CA where the Court of Appeal per Gopal Sri Ram JCA

(as he then was) said:

We there have here a situation whereby the parties have by their contemporaneous conduct subsequent to the making of the option agreement placed an interpretation on cl. 2 of exh. P 2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause. Is it then open to a court to place a different interpretation on cl. 2? With respect, we think not.

We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Tools v Schuler AG* [1974] AC 235). *But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning.* See, *American Surety Co of New York v Calgary Mining Co Ltd* [1919] 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction.

See: *Amalgamated Investment & Property Co Ltd (In liquidation) v Texas Commerce Bank* [1982] QB 84; *Boustead Trading [1985] Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283.

In our respectful view, this is the error into which the learned judge in the court below fell. Instead of hearkening to the way in which the parties themselves acted towards each other in relation to the meaning of cl 2, he erred in accepting the invitation of the defendants' (respondents before us) counsel to place a different interpretation on the said clause. It follows from what we have said thus far that there was a concluded and binding agreement between the parties in terms of the draft agreement sent under cover of the appellants' solicitors' letter dated 17 April 1993. This is accordingly a case which demands appellate interference.

[43] Therefore, to reiterate, I find that the plaintiff is contractually required to replace any trees that are dead or rejected by the defendant 'for any reason whatsoever'. Even if the plaintiff's contention that the trees were dead due to natural or due to external factors, the plaintiff did make a binding promise that they will maintain the same and replace such dead trees.

[44] I will now go on to explain the issue in dispute between parties.

MAIN ISSUE IN DISPUTE — VALIDITY OF VARIATION ORDER NUMBER 15

[45] After considering the pleadings filed by the parties and the facts admitted in the said documents, I find that there is only one main issue that must be decided by this court, that is whether the defendant is entitled to issue the variation order dated number 15 and whether the deduction made in the said variation order is justified in the circumstances of this case.

- A [46] The reason I say so is because the difference between the plaintiff and the defendant lies solely on the validity of the variation order number 15. The plaintiff accepts wholly the applicability of the variation order numbers 1 to 14 and accepts the deduction of the sums stated therein from the amount payable for the works done by the plaintiff under the terms of the contract. The
- B plaintiff is also not challenging the adjustment to the provisional sum made by the defendant. This could be explained from the summary below based on the statement of final account prepared by the defendant dated 21 June 2012 and the plaintiff's letter dated 6 July 2012. When one adds the sums deducted due to the variation order number 15 ie, the sum of RM3,077,875.68 and the sum
- C the plaintiff wishes to pay ie, the sum of RM58,417.57, one will get the sum of RM3,136,293.25.

- [47] Given the above, I find that the main issue in dispute lies on the validity of variation order No 15.
- D

- [48] I have highlighted earlier; the defendant's representative, KLCC Property, had issued the following certificates on the following dates:

- (a) the certificate of practical completion on 5 November 2009; and
- E (b) certificate of making good defects on 5 January 2012.

- [49] This would indicate to this court that the works to the projects were completed on 5 November 2009 and that the defects liability period of 12 months would then commence from 6 January 2009. If there were any defects, the defendant would then be required to provide a defects list to be remedied further by the plaintiff.
- F

- [50] Another important fact is that the defendant did produce a list of the number of trees that were planted by the plaintiff at the time the CMGD was issued. The plaintiff on the other hand did not issue any document to show the number of trees it had planted before the issuance of the certificate of practical completion and the number of trees that it replanted during the defect liability period before the issuance of the CMGD.
- G

- [51] I agree with the plaintiff's contention that the Variation Order No 15 was issued only after the certificate of completion was issued by the defendant. This variation order came into being at the time when the final certificate was being prepared by the defendant.
- H

- [52] Therefore, what is important is whether the CMGD certificate is final and represents that the work was completed and that the defendant should pay the plaintiff for the sums claimed. I am of the opinion that the CMGD is not final and binding but is merely prima facie evidence of the work done. This
- I

prima facie position may be rebutted by the defendant up to the point when the final certificate is issued. The defendant is not entitled to issue any variation orders after the CMGD is issued unless agreed to by the plaintiff. This is to ensure that the plaintiff is not required to undertake any additional work or reduce any scope of work. The final certificate is issued based on the actual work done by the plaintiff to the satisfaction of the defendant.

A

B

[53] I refer to *Hudson's Building and Engineering Contracts* (11th Ed) by Ian Duncan Wallace at para 4.182 where the author stated:

the last of the above-mentioned cases [*SJ and MM Price Ltd v Milner* [1968]] although somewhat inadequately reported supports the view that variations as well as original contract work cannot be instructed after practical completion of the remainder of the work in the absence of express provision, unless of course the Contractor is willing to carry them out.

C

D

[54] This position was also reiterated by R Knowles in *Contractual Problems and their Solutions* ((2nd Ed) Wiley-Blackwell, May 2008) at p 142 where the author stated:

Once practical completion has been achieved, however, the contractor has no obligation to carry out the varied work instructed by the architect/engineer. An exception would be were the contract expressly provides for variations being issued post practical completion.

E

This indicates to me that the final conclusive document if any, would be the final certificate. Of course, this would depend on the terms of each contract.

F

[55] I note that the defendant is relying on cl 46.1 and cl 49.1 of the contract. These provisos have been produced in the earlier parts of this judgment.

G

[56] As I said earlier, I agree with the defendant's contention that the issuance of the CMGD does not mean that the defendant is barred from challenging the adequacy of the works done by the plaintiff or relieve the obligation of the plaintiff from ensuring that all the works were done in accordance with the terms of the contract. Clauses 46.1 and 49.1 do indicate that the certificates issued by the representatives are not final and conclusive. Parties are also not relieved from their contractual obligations and are still required to ensure that their obligations under the contract are fulfilled.

H

I

[57] Learned counsel for the defendant did highlight the letter dated 2 May 2003, minutes of the meeting held on 19 April 2006, letters dated 16 December 2009, 5 August 2010, 31 March 2010, and 13 November 2011. He had correctly pointed out that the defendant did raise these issues early and

A continued to do so during the lifetime of the contract. The work undertaken by the plaintiff was not satisfactory, especially concerning the replanting of the dead trees as directed by the defendant. These letters were issued before the CMGD was issued by the defendant's representative.

B [58] As I have highlighted earlier, before the issuance of the final certificate, the plaintiff is under a contractual obligation to ensure that all defects and any shortcomings to their works must be fully completed. The defendant or its representative is under no obligation to issue the CMGD until such time that all works were completed.

C
D [59] I also find that based on cll 46.1 and 49.1 of the contract, the CMGD is prima facie evidence that the works were completed. However, this prima facie evidence is not conclusive and may be subject to challenge or explanation by the defendant. There is no clause that indicates that parties agreed that the certification issued by the defendant's certification is conclusive or binding on parties. In fact, on the corollary, based on the aforesaid clauses the defendant is entitled to challenge the amount of work undertaken by the plaintiff before the final certificate is issued. Therefore, the defendant must produce evidence to rebut this prima facie evidence.

E
F [60] In this case, I find that the defendant did produce voluminous documents to show the number of trees that were planted and accepted by it from the plaintiff. In the said list, the defendant had identified that the trees that were accepted were to the amount of 82,573. The checklist was also produced by the defendant.

G [61] The defendant had painstakingly produced the list of the trees that were planted and accepted by it. This was also explained by the defendant's witnesses. This is to be contrasted to the evidence of the plaintiff which only relied on a report or a summary prepared by it to persuade the defendant to agree to make payment. There is no evidence made available to this court by the plaintiff to show that it had planted or replaced the dead trees or rejected trees. The plaintiff should have produced a list of the trees that they have planted to replace the dead and rejected trees to enable this court to see whether its contention is correct.

H
I [62] As I said earlier, I am of the opinion that the CMGD is not the final document that will bring the contract to an end. The conclusive document is the final certificate which is currently in dispute. This final document will indicate or 'signify the contract administrator's satisfaction with the work, or the amount which is finally due to the contractor or both of these things' (see *Murdoch and Hughes quoted by Ir Harban Singh KS in Final Certificates: A review of Pertinent and Procedural Issues*).

[63] I find that the explanation given by IR Harban Singh KS in the aforementioned article is helpful on this issue. The learned author commented on the PAM 98 Form and JKR/PWD form commonly adopted in these kinds of contracts, where similar terms relating to CMGD and final accounts also appear:

... the Final Certificate on a broad brush approach, is generally of the following effect:

– It signifies the contract administrator's satisfaction that the work carried out by the contractor conforms with the contract i.e. it is sufficient and that the completion criteria had been achieved, etc; and/or

– It certifies the amount which is finally due to the contractor; and/or

– It renders the contract administrator functus office.

[64] Given that the defendant did produce the relevant documents showing the number of trees planted and the number of trees that were rejected, it then falls on the plaintiff to rebut the evidence produced. The burden of proof then shifts to the plaintiff to show it had undertaken the work.

[65] I refer to ss 101 to 103 of the Evidence Act and to the judgment of the Malaysian Federal Court in *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31.

[66] Salleh Abas FJ delivering the judgment of the Federal Court stated:

For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors*. AIR 1961 SC 1474, 1478 and *Raghavamma v Chenchamma* AIR 1964 SC 136, 143). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th Ed paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[67] Having failed to produce documents and evidence to show that it had

A replaced the dead and rejected trees, the plaintiff has failed to prove its contention. The plaintiff had also failed to call the persons who were responsible for the said project. No witnesses were offered to show that they were involved in the actual operations of planting the trees and the inspection process during the defect liability period.

B
C [68] The plaintiff had only offered the: (a) the director of the plaintiff, Iszhar bin Ibrahim, who did not participate in the actual work done but was only involved in the negotiations process later on; and (b) Anuar bin Mohamed, who was also the former Chief Executive Officer of the plaintiff. These individuals are far up the corporate ladder of the plaintiff and do not have the personal requisite knowledge of the facts involving the actual work done. I do not find that the plaintiff has shown to my satisfaction that the trees were fully planted and all dead or rejected trees were replaced.

D [69] This is to be compared to the defendant's evidence. As I have reiterated earlier, the defendant did produce meticulous documentation detailing the work done by the plaintiff. The defendant also produced: (a) Haslinda Khalid, the officer in charge of the project; (b) Rosslan bin Yaacob, the arborist in charge of the project appointed by the defendant; and (c) Dorriah bt Mat, the project manager appointed by KLCC properties, among others. These officers were involved in the project and the process of certifying the number of trees replanted by the plaintiff. Their evidence was also consistent with contemporaneous documentary evidence presented to court.

F [70] To me this shows that the defendant has discharged its evidential burden and that the evidence of the plaintiff is found wanting. Therefore, I find that on a balance of probabilities, the defendant has shown that the number of trees that were accepted by it was of 82,573 trees and that the defendant had rejected the amount of 13,390 trees from the plaintiff.

G [71] The plaintiff is contractually required to replace 13,390 trees and if it failed to do so, then it should not be allowed to claim the full contract sum.

H [72] I also find that the contemporaneous documents indicate that the plaintiff did fail to replant the dead or rejected trees. The plaintiff's own letter dated 31 March 2010 admits that 15,958 had been rejected by the defendant. This was eventually followed by the plaintiff's request to seek a waiver from the defendant to replant the whole trees. Even at the time when the certificate of making good defects, the plaintiff did issue the list of trees that were replaced and this only showed that the plaintiff had only planted 82,573 trees.

I [73] I am of the opinion that the plaintiff has failed to show that it has planted or replaced 13,390 trees as required under the terms of the contract at

the time when the defect liability period was in place. To force the defendant to make payment for the full contract sum, the plaintiff must provide evidence that it did replant the remaining 13,390 trees to the satisfaction of the defendant or the defendant's representatives. No such evidence was shown to this court.

A

[74] As I said earlier, the defendant did issue a variation order after the certificate of making good defect was issued by it and generally, as identified earlier, a contractor is not bound by a variation order issued after the date of the certificate of making good defects.

B

[75] However, I find that the facts of this case show that the true nature of the said document is not that of a variation order (ie, a document to record instructions of either to enlarge or reduce the scope of work) but is a certificate to confirm the amount of actual work undertaken by the plaintiff. This was also confirmed in the list of trees planted produced by the defendant as I have identified earlier. The said list and the variation order are consistent with one another and indicate that only 82,573 trees were planted and the remaining 13,390 trees were not replanted.

C

D

[76] Therefore, having assessed the documentary evidence objectively and the evidence tendered through the aforementioned witnesses, I find that the plaintiff did fail to replace or to replant the trees that were rejected by the defendant. The plaintiff will not be entitled to claim for the full contractual sums as these trees were not planted and not maintained by the plaintiff appropriately in accordance with the terms of the contract.

E

F

[77] Given the above, I find that the plaintiff is only entitled to be paid the sum of RM58,417.57.

G

[78] I, therefore, decline to make any of the orders sought by the plaintiff against the defendant.

ISSUES RAISED BY THE PLAINTIFF

H

[79] I note that the plaintiff did raise several other issues as to the position adopted by the defendant. I will deal with these issues in the following paragraphs.

Difference in the figures in the statement of final account

I

[80] The first issue concerns the comparison of the plaintiff's draft final account to that of the defendant. The plaintiff contends that the sum identified in the final account ie, the original contract value and the value of the contract

- A after the adjustment stated in the defendant's version is incorrect and that it is the plaintiff's version that should be relied on.

[81] I agree that there is a difference between the two versions. However, the issue in dispute is not really on the difference as to the original contract value or the value of the contract after adjustment. When I compare the two tables, I find that the issue at hand pertains to the sum of RM3,136,293.25. When one adds the sum deducted by the variation order number 15 of RM3,077,875.68 with the sum of RM58,417.57, one will get the total sum of RM3,136,293.25. Therefore, as I have said earlier, the parties agree that this is the remainder of the contract sum. The issue in dispute is concerning with whether the whole sum should be paid or that, as argued by the defendant, after deducting the dead/rejected trees, that the sum of RM58,417.57 should only be paid.

- D [82] As I have stated earlier, I find that only the sum of RM58,417.57 is due to be paid to the plaintiff. I, therefore, reject the plaintiff's contention on this issue.

E *Validity of the variation order — Not acknowledged and after the certificate of making good defects*

- F [83] This issue has been addressed by me earlier and I do not intend to repeat the same. Essentially, I am of the opinion that the defendant is entitled to issue a certificate to determine the amount payable by it to the plaintiff for the amount of work actually done. I agree that the plaintiff is not entitled to issue a new entitled a variation order.

- G [84] However, as I have stated earlier, the document issued by the defendant is not a variation of the contract but only states the amount deducted from the main contract for work not completed by the plaintiff. Therefore, I reject the contention raised by the plaintiff on this issue.

Effect of the consent order

- H [85] The second last issue I would like to address is the effect of the consent order. It is clear to me that parties agreed to the following terms:

I

DIHADAPAN HAKIM
HUE SIEW KHENG
PADA 9 NOVEMBER 2011

DALAM KAMAR

PENGHAKIMAN PERSETUJUAN

TINDAKAN INI ditetapkan untuk dibuat di hadapan Yang Auli Hakim Hue Siew Kheng **DAN SETELAH MENDENGAR** Engr. Ismail Bin Mohamad Ariff, peguamcara bagi pihak Plaintiff dan Engr. Hafid Bin Hamzah, peguamcara bagi pihak Defendant, **SECARA PERSETUJUAN ADALAH DIHAKIMI BAHAWA:**

1. Defendan hendaklah membayar gaji rugi sebanyak RM2,449,368.49 kepada Plaintiff pada atau sebelum 31 Julai 2011.
2. Baki Bayaran Kontrak No: PPJCS/JRG/TBS/11/2003 sebanyak RM4,273,086.27 hanya akan dibayar oleh Defendan kepada Plaintiff:
 - (a) selepas tamat tempoh tanggungan kecacatan; dan
 - (b) selepas Akad Muktamad disediakan dan dipersetujui oleh Plaintiff dan Defendan.
3. Tindakan sebarang Pihaklah untuk kes.

FARAH HANA BINTI HASRIN
 PENCIKAM KAMAR PENGHAKIMAN
 MAHKAMAH TINGGI MALAYSIA
 Penolong Kwartir Mahkamah
 Mahkamah Tinggi
 Kuala Lumpur

[86] This does not mean that parties agreed that the sum of RM4,237,086.27 or any part thereof becomes due and payable to the plaintiff. Parties must still comply with the terms of the contract and in particular the final account settlement process. Parties are still required to ensure that all works were done and that the sums due and outstanding for work done to be paid. The terms of the consent judgment do not constitute an unequivocal admission by the defendant that the full sum of RM4,237,086.27 is due and payable to the plaintiff. It only agreed to pay the sums certified on the issuance of the final certificate.

[87] The effect of a consent judgment is explained by Ramli Ali J (as he then was) in *Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors* [2008] 6 MLJ 839; [2008] 5 CLJ 130. His Lordship stated that a consent judgment is to be interpreted in the same way as a contract and that the usual principles of contractual construction is to be applied ie that the intention of parties are to be gleaned from the words utilised in the contract and must be looked at objectively. Also refer to the judgment of the Court of Appeal in *Dahan Cipta Sdn Bhd & Anor v Yong Tshu Khin & Ors and other appeals* [2017] 6 MLJ 638; [2017] 1 CLJ 257.

A [88] I find that the terms of the consent order require that the terms of the final payment must be undertaken through the process of issuance of the final account as provided under the terms of the contract. The amount payable must be determined by the defendant's representative in accordance with the amount of actual work done, including any work undertaken during the defect liability period.

C [89] As I have stated earlier, the defendant has shown to this court that only the amount of RM58,417.57 is due and that the plaintiff had failed to replant 13,390 trees that were dead or rejected by the defendant. Having failed to comply with its obligation, the plaintiff is not entitled to be paid for the full sums claimed.

Demeanor of witnesses

D [90] The plaintiff submits that the witness presented by the defendant was less than satisfactory and this court should reject their evidence in toto.

E [91] I am however of the opinion that the said witnesses were attempting to assist this court to ascertain the facts of this case based on the written documents and their recollection of the facts. It is important that I consider that these events occurred sometime in the year 2003–2017. The documentary evidence tendered was also voluminous. It would not be surprising that the defendant's witnesses needed time to consider the issues and consider the documents when he or she was cross examined by the plaintiff's counsel.

G [92] As I had alluded earlier, the defendant's witnesses were those who were directly involved in the project and were involved in the assessment of the dead trees, and the replacement process undertaken by the plaintiff during the defect liability period. The defendant did call Puan Doriah bt Mat, who was the project manager responsible to ensure that the trees were planted in accordance with the requirements of the project. The defendant also brought Roslan bin Yaacob, the Forestry consultant, Mohd Sobri, the civil and structural consultant and Ramzaa bin Idris the Landscape Architect consultant. Their evidence is consistent with the documentary evidence, and I find it credible based on the circumstances of this case.

I [93] I refer to the decision of the Court of Appeal in *Lee Ing Chin@Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at pp 98–99; [2003] 2 CLJ 19:

(2) Generally, an appellate Court will not intervene unless the trial Court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his

decision on an issue of fact or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporaneous documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against these. He must also test the evidence of a witness against the probabilities of the case. The principle central to appellate interference is that the decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

[94] Therefore, after considering the evidence tendered by the parties, I prefer the version of events presented by the defendant and its witnesses. On the balance of probabilities, I find that the evidence of the defendant's witnesses is true as they are consistent with contemporaneous documents.

DECISION OF THIS COURT

[95] Based on the aforesaid, I dismiss the plaintiff's claim with cost of RM30,000 subject to allocator. I make the following declaration:

- (a) that the plaintiff is only entitled to be paid the sum of RM58,417.57; and
- (b) that the draft final account prepared by the defendant is correct based on the sum of RM58,417.57 to be paid to the plaintiff by the defendant.

Plaintiff's claim dismissed with costs of RM30,000 subject to allocator.

Reported by Dzulkarnain Ab Fatar

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